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OFFICE OF PETITIONS

In re Application of :
VERMOLA et al. :
Application No. 10/561,337 : **DECISION ON PETITION**
Filed: 12/15/2005 :
Attorney Docket No. 886A.0018U1(US) :

This is a decision on the petition under 37 CFR 1.137(a), which is being treated as a petition under 37 CFR 1.181 (no fee), filed December 4, 2008, requesting withdrawal of the holding of abandonment in the above-identified application.

The petition is **GRANTED**.

This application was held abandoned for failure to reply to the nonfinal Office action mailed February 4, 2008, which set a three (3) month shortened statutory period for reply. In the absence of a timely filed reply, the application became abandoned on May 5, 2008. On September 2, 2008, the Office mailed a Notice of Abandonment.

Petitioner asserts that the nonfinal Office action dated mailed February 4, 2008, was not received at the correspondence address of record.

A review of the written record indicates no irregularity in the mailing of the Office action and in the absence of any irregularity, there is a strong presumption that the Office action was properly mailed to the practitioner at the address of record. This presumption may be overcome by a showing that the Office action was not in fact received.

As stated in Section 711.03(c)(I)(A) of the Manual for Patent Examining Procedure:

In Delgar v. Schulyer, 172 USPQ 513 (D.D.C. 1971), the court decided that the Office should mail a new Notice of Allowance in view of the evidence presented in support of the contention that the applicant's representative did not receive the original Notice

of Allowance. Under the reasoning of Delgar, an allegation that an Office action was never received may be considered in a petition to withdraw the holding of abandonment. If adequately supported, the Office may grant the petition to withdraw the holding of abandonment and remail the Office action. That is, the reasoning of Delgar is applicable regardless of whether an application is held abandoned for failure to timely pay the issue fee (35 U.S.C. 151) or for failure to prosecute (35 U.S.C. 133).

To minimize costs and burdens to practitioners and the Office, the Office has modified the showing required to establish nonreceipt of an Office action. The showing required to establish nonreceipt of an Office communication must include a statement from the practitioner describing the system used for recording an Office action received at the correspondence address of record with the USPTO. The statement should establish that the docketing system is sufficiently reliable. It is expected that the record would include, but not be limited to, the application number, attorney docket number, the mail date of the Office action and the due date for the response.

Practitioner must state that the Office action was not received at the correspondence address of record, and that a search of the practitioner's record(s), including any file jacket or the equivalent, and the application contents, indicates that the Office action was not received. A copy of the record(s) used by the practitioner where the non-received Office action would have been entered had it been received is required.

A copy of the practitioner's record(s) required to show non-receipt of the Office action should include the master docket for the firm. That is, if a three month period for reply was set in the nonreceived Office action, a copy of the master docket report showing all replies docketed for a date three months from the mail date of the nonreceived Office action must be submitted as documentary proof of nonreceipt of the Office action. If no such master docket exists, the practitioner should so state and provide other evidence such as, but not limited to, the following: the application file jacket; incoming mail log; calendar; reminder system; or the individual docket record for the application in question.

The showing outlined above may not be sufficient if there are circumstances that point to a conclusion that the Office action may have been lost after receipt rather than a conclusion that the Office action was lost in the mail (e.g., if the practitioner has a history of not receiving Office actions).

After reviewing the documents submitted on petition, the Office concludes that the showing of record is sufficient to warrant withdrawal of the holding of abandonment. The practitioner submitted a copy of the docket records showing all action items due on Sunday, May 4, 2008 and Monday, May 5, 2008, and the corresponding date the action was timely completed. The

practitioner stated the nonfinal Office action would have been entered in this docketing system had it been received and docketed. The practitioner attested to the fact that a search of the records indicated that the nonfinal Office action was not received at the correspondence address of record. Accordingly, petitioner presented the required showing under 37 CFR 1.181.

The petition under 37 CFR 1.181 is **GRANTED**. The holding of abandonment is hereby withdrawn. As no petition fee is required, the Office will refund the \$540.00 fee submitted with the petition.

The matter is being referred to the Technology Center 2671 for appropriate action on the reply filed December 4, 2008.

Telephone inquiries related to this decision may be directed to the undersigned at (571) 272-3211.

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